SUPREME COURT OF FLORIDA
CASE NO.: 95,889

Florida Bar Number: 311200

DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

IN THE

SUPREME COURT OF FLORIDA

BONNIE ROSEN

Petitioner

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION

Respondent

PETITIONER'S BRIEF ON THE MERITS

Respectfully submitted,

TILGHMAN & VIETH, P.A.
Counsel for Appellee
One Biscayne Tower, Suite 2401
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 381-8806

Lauri Waldman Ross, Esq.
Lauri Waldman Ross, P.A.
Counsel for Appellee
Two Datran Center, #1705
9130 S. Dadeland Blvd.
Miami, Florida 33156
(305) 670-8010

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New.

TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OTHER AUTHORITIES viii

PREFACE 1

STATEMENT OF THE FACTS 2

STANDARD OF REVIEW 13

SUMMARY OF THE ARGUMENTS 13

ARGUMENTS 17

I. COPE HAS NO APPLICATION TO SUITS AGAINST FIGA FOR FAILURE TO PAY "COVERED CLAIMS." 17

A. Rosen had a direct cause of action against FIGA which was not released. 24

B. Figa Anticipatorily Breached its Obligations to its Insured, Triggering the Settlement 29

C. Figa Was Bound by All Terms of a Settlement Entered into with its Knowledge and Consent, but in Any Event, Evidence of Figa's Knowledge and Tacit Consent Precluded Entry of a Defense Summary Judgment 33

II. FIGA'S DEDUCTION OF ITS OWN DEFENSE COSTS FROM THE AMOUNT DUE AND PAYABLE ON "COVERED CLAIMS" IS CONTRARY TO THE STATUTORY LANGUAGE AND PURPOSE OF THE FLORIDA INSURANCE GUARANTY ASS'N ACT, §631.50, *ET SEQ.*, FLA. STATS. (1997) 36

III. FIGA IS RESPONSIBLE FOR CLAIMANTS ATTORNEYS FEES IN PURSUING HER CLAIM, AND SUCH FEES ARE NOT INCLUDED IN THE $300,000 CAP FOR "COVERED CLAIMS." 44

CONCLUSION 47

CERTIFICATE OF SERVICE 48

TABLE OF AUTHORITIES

*§ 631.51 23

*§631.51, Fla. Stats. (1997) 3

Arizona Property & Cas. Ins. Guar. Fund v. Helme,
153 Ariz. 129, 735 P.2d 451 (Ariz. 1987) 15, 29

Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.,
470 So. 2d 810 (Fla. 1st DCA 1985) 29

Clark Equipment Co. v. Arizona Property Cas. Ins. Guar. Fund,
189 Ariz. 433, 943 P.2d 793 (Ariz. Ct. App. 1997) 42

Coastal Petroleum Co. v. Chiles,
656 So. 2d 284 (Fla. 1st DCA 1995) 35

Coleman v. Florida Ins. Guar. Ass'n, Inc.,
517 So. 2d 686 (Fla. 1988) 13

Connecticut Ins. Guaranty Ass'n v. Union Carbide Corp.,
217 Conn. 371, 585 A. 2d 1216 (Conn. 1991) 26

Cunningham v. Standard Guar. Ins. Co.,
630 So. 2d 179 (Fla. 1994) 19, 28

Fidelity & Cas. Co. of New York v. Cope,
462 So. 2d 459 (Fla. 1985) . . 1, 11-14, 17, 19, 20, 24, 27, 28

Florida Ins. Guar. Ass'n v. Giordano,
485 So. 2d 453 (Fla. 3d DCA 1986) 20, 32, 45, 47

Florida Ins. Guar. Ass'n v. Jacques,
643 So. 2d 101 (Fla. 4th DCA 1994) 46

Florida Ins. Guar. Ass'n v. Renfroe,
568 So. 2d 962 (Fla. 1st DCA 1990), rev. den.,
581 So. 2d 1308 (Fla. 1991) 24

Florida Insurance Guaranty Association v. Giordano,
485 So. 2d 453 (Fla. 3d DCA 1986) 1

Florida State Racing Comm'n v. Bourquardez,
42 So. 2d 87 (Fla. 1949) 38

Grissom v. Commercial Union Ins. Co.,
610 So. 2d 1299 (Fla. 1st DCA 1992), rev. den.,

621 So. 2d 1065 (Fla. 1993) 37

H.K. Porter Co., Inc. v. Pennsylvania Ins. Guar. Ass'n,
75 F.3d 137 (3rd Cir. 1996) 26

Holl v. Talcott,
191 So. 2d 40 (Fla. 1966) 2, 33

Insurance Co. of North America v. Lexow,
602 So. 2d 528 (Fla. 1992) 47

Kelly v. Williams,
411 So. 2d 902 (Fla. 5th DCA), rev. den,
419 So. 2d 1198 (Fla. 1982) 11, 17-19, 28

Kuvin, Klingensmith & Lewis, P.A. v. Florida Ins.
Guaranty Ass'n, Inc., 371 So. 2d 214 (Fla. 3d DCA 1979) . . 24

Landis v. Mears,
329 So. 2d 323 (Fla. 2nd DCA 1976) 34

Miami Gardens, Inc. v. Conway,
102 So. 2d 622 (Fla. 1958) 36

Missouri Property and Cas. Ins. Guar. Ass'n (MIGA) v.
Petrolite Corp., 918 S.W. 2d 869 (Mo. Ct. App. 1996) . . 15, 41, 42

Missouri Property and Casualty Ins. Guaranty Ass'n v.
Pott Industries, 971 S.W. 2d 302 (Mo. 1998) 42

Moore v. Morris,
475 So. 2d 666 (Fla. 1985) 2

New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc.,
142 N.H. 573, 705 A. 2d 1190 (N.H. 1998) 26

O'Malley v. Florida Ins. Guaranty. Ass'n,
257 So. 2d 9 (Fla. 1971) 23

Peacock Const. Co., Inc. v. Modern Air Conditioning, Inc.,
353 So. 2d 840 (Fla. 1977) 13

Peoples v. Florida Ins. Guar. Ass'n., Inc.,
313 So. 2d 40 (Fla. 2d DCA 1975), cert. den.,
327 So. 2d 34 (Fla. 1976) 23

Racetrac Petroleum, Inc. v. Delco Oil, Inc.,
721 So. 2d 376 (Fla. 5th DCA 1998) 13

Rosen v. Florida Insurance Guaranty Association,
734 So. 2d 491 (Fla. 1st DCA 1999),
rev. granted (April 28, 2000) 1

Sands v. Pennsylvania Ins. Guaranty Ass'n,
283 Pa. Super. 217, 423 A. 2d 1224 (Pa. 1980) 20, 21

State ex rel. Watkins v. Eighth District Court of Appeals,
82 Ohio St. 3d 532, 696 N.E. 2d 1079 (Ohio 1998) 26

State, Dept. of Environmental Protection v. Burgess,
667 So. 2d 267 (Fla. 1st DCA 1995) 35

Stein v. Miss Franie's, Inc.,
417 So. 2d 726 (Fla. 1st DCA 1982) 34

Stepanek v. Rinker Materials Corp,
697 So. 2d 200 (Fla. 1st DCA 1997) 38

Tillman v. State,
471 So. 2d 32 (Fla. 1985) 36

Trushin v. State,
425 So. 2d 1126 (Fla. 1982) 36, 37

Vance v. Bliss Properties,
109 Fla. 388, 149 So. 370 (Fla. 1933) 36

Vest v. Travelers Ins. Co.,
2000 WL 232281, 25 Fla. L. Wkly. S177 (Fla. 2000) 1

Washington v. Fleet Mort. Corp.,
631 So. 2d 364 (Fla. 1st DCA 1994) 33

Zinke-Smith, Inc. v. Florida Ins. Guarnty Ass'n,
304 So. 2d 507 (Fla. 4th DCA 1974), cert. denied,
315 So. 2d 469 (Fla. 1975) 46

§631.51, Florida Statutes, (1997) 23, 25, 40, 45

§631.70, Florida Statutes, (1997) 44, 45, 47

OTHER AUTHORITIES

Alabama Insurance Guaranty Ass'n Act, §27-42-1, (Acts 1980) . 21

Alaska Insurance Guaranty Ass'n Act., §21.80.010 (1998) . . . 21

Arizona Administration of Insolvency, 7 Ariz Rev. Stats. Ann. §20-661 (1977, as amended by Laws, 1999) 21

Arkansas Property & Cas. Ins. Guar. Act §23-90-101 (1999) . . 21

Colorado Ins. Guaranty Ass'n Act. §10-4-501, (Laws 1971) . . 21

Connecticut Ins. Guar. Ass'n Act. §380-836 (eff. 7/1/97) . . 21

Couch on Insurance 3d, §6:28 (1997) 24

Delaware Insurance Guaranty Ass'n Act, 18 Del. Code Ann. §4201 (1999) 21

District of Columbia Property and Liability Insurance Guaranty Association, D.C. Code §35-3901 (1981 ed. as amended eff. 1997) 21

Florida Constitution Article V, §3 1

Florida Statue 631.50, (1997) 1

Havens, "Insurance Guaranty Laws: An Update on Litigation," 16 The Forum 1183 (ABA 1981) 20, 21

Hawaii Insurance Guaranty Association Act., 9 Haw. Rev. Stats. Ann. §431.16-101, (1987) 21

Idaho Insurance Guaranty Ass'n, 7 B Idaho Code 41-3601, (1970) 21

Illinois Insurance Guaranty Fund, Smith-Hurd Illinois Compiled Stats. Ann., 215 IL CS 5/532 (eff. 7/21/71) 21

Indiana Insurance Guaranty Ass'n Law of 1971, §27-6-8-1, (1971) 21

Iowa Ins. Guaranty Ass'n, ICA §515B.1, (1971) 22

Kansas Insurance Guaranty Ass'n Act, 40-2901 (1970) 22

Kentucky Insurance Guaranty Ass'n, KRS 304.36-010, (1983 & 1997 Supp.) 22

Laws 1970, chapter 70-20, §1 22

Louisiana Ins. Guaranty Assoc. Law, R.S. 22:1375 (2000) . . . 22

Maine Ins. Guaranty Ass'n Act, 24-A §4431 (2000) 22

Martino v. Florida Ins. Guaranty Ass'n,
383 So. 2d 942 (Fla. 3d DCA 1980) 33, 36

Maryland Property & Casualty Ins. Guaranty Corp.,
§9-301, (1997) 22

Mass. Insurers Insolvency Fund, 175 D §1 (1998) 22

Michigan Property and Casualty Guaranty Assoc. Act.
§500.7901, (2000) 22

Minnesota Ins. Guaranty Ass'n, §60c.01 (1996) 22

Mississippi Ins. Guaranty Assn §83-23-101, (1999) 22

Missouri Property and Casualty Guaranty Ass'n Act,
§375.771, (2000) 22

Montana Ins. Guaranty Ass'n §33-10-101, (1999) 22

National Union Fire Ins. Co. v. Lenox Liquors, Inc.,
358 So. 2d 533 (Fla. 1977) 29

Nebraska Property & Liability Ins. Guaranty Ass'n Act,
§44-2401, (1999) 22

Nevada Insurance Guaranty Ass'n, §687A. 010, (1999) 22

New Hampshire Insurance Guaranty Ass'n, §404-B:1, (1998) . . 22

New Jersey Property Liability Insurance Guaranty Association,
§17:30A-5, (2000) 22

New Mexico Property and Casualty Ins. Guaranty Fund,
§59A-43-1, (1999) 22

New York Property Casualty Insurance Fund, McKinney's
Insurance Law, §§7602(2), (1998) 22

North Carolina Ins. Guaranty Association Act, N.C. Gen. Stat.
§58-48-1, (1999) 22

North Dakota Ins. Guaranty Ass'n, §26.1-42.1, (1999) 22

Ohio Property & Casualty Ins. Guaranty Ass'n,
Page's RSA §3995.01, (1996) 22

Oklahoma Property & Casualty Ins. Guaranty Ass'n Act,
36 §2001, (1999) 22

Oregon Insurance Guaranty Ass'n, §734.510, (1999) 22

Pennsylvania Ins. Guaranty Ass'n, 40 P.S. §221.1, (1999) . . 22

Report of B5 Industry Advisory Committee, II NAIC
Proceedings (1971) 20

Rhode Island Insurers' Insolvency Fund Act, §27-34-1, (1999) 22

Rule 1.510, Florida Rule Civil Procedure 33

South Carolina Ins. Guaranty Ass'n Act, §38-31-30, (1999) . . 22

South Dakota Ins. Guaranty Assoc, §58-29A-1, (1999) 22

Tennessee Insurance Guaranty Association Act,
Tenn. Code An. 56-12-101, (1998) 22

Vermont Property & Casualty Ins. Guaranty Ass'n,
T.8 §3611 (1984) 22

Virginia Property & Casualty Ins. Guaranty Ass'n,
§38.2-1600 (1999) 22

Washington Insurance Guaranty Ass'n Act,
RCWA 48.32.010, (1999) 22

West Virginia Ins. Guaranty Ass'n Act, §33-26-1, (1996) . . . 22

Wyoming Ins. Guaranty Ass'n Act, §26-31-101, (1999) 22

§375.785, Missouri Revised Statute, (1986) 41

§627.428, Florida Statutes, (1997) 16, 44-47

§631.193, Florida Statutes, (1997) 27

§631.50, Florida Statutes, (1997) 22

§631.51, Florida Statutes, (1997) 3, 23

§631.53, Florida Statutes, (1997) 24, 37, 45

§631.54, Florida Statutes, (1997) 25, 30, 38

§631.55, Florida Statutes, (1997) 23

§631.57, Florida Statutes, (1997) 23, 24, 38, 40, 41

§631.60, Florida Statutes, (1997) 25, 27

§631.61, Florida Statutes, (1997) 25

§631.66, Florida Statutes, (1997) 24

PREFACE[1]

Pending for review is Rosen v. Florida Insurance Guaranty Association, 734 So. 2d 491 (Fla. 1st DCA 1999), rev. granted (April 28, 2000) which expressly, directly conflicts with Florida Insurance Guaranty Association v. Giordano, 485 So. 2d 453, 457 (Fla. 3d DCA 1986). This Court also has jurisdiction by virtue of the First District's misapplication of this Court's prior holding in Fidelity & Cas. Co. of New York v. Cope, 462 So. 2d 459, 462 (Fla. 1985). See Vest v. Travelers Ins. Co., 2000 WL 232281, 25 Fla. L. Wkly. S177 (Fla. 2000) (District court's misapplication of this Court's holdings created conflict jurisdiction for purposes of Fla. Const. art. V, §3(b)(3)).

For the reasons submitted, it is respectfully requested that this Court quash the First District's decision and answer the remaining legal issues which raise matters of great public importance regarding construction of the Florida Insurance Guaranty Association Act, ("The FIGA Act"), section 631.50, *et. seq.*, Fla. Stats. (1997).

[1] All references are to the record (R.) as supplemented by transcripts contained in the First District Court of Appeals' file. (S. R.). References are also to depositions which petitioner filed, which were indexed separately by the clerk. (___ depo. p.).

STATEMENT OF THE FACTS

On review of a summary judgment, all facts and inferences derived from the facts must be construed in the light most favorable to the non-movant. Moore v. Morris, 475 So. 2d 666 (Fla. 1985); Holl v. Talcott, 191 So. 2d 40 (Fla. 1966). Accordingly, the facts detailed here are set forth in the light most favorable to Petitioner Rosen.

Bonnie Rosen hired AB law firm to represent her in connection with several litigation matters. Serious problems in the representation arose and, in 1992, Rosen filed suit against the AB firm in Dade County, Florida alleging *inter alia* an abusive pattern of overbilling and the law firm's negligence in her representation. (R. Vol. I, p. 82-98). At the time the suit was filed, AB law firm was insured in the amount of $1,000,000. by a policy issued by Manatee Insurance Co. f/k/a Rumger Ins. Co. (R. Vol. I, pp. 11-12, ¶ 5).

In pertinent part, the policy provided:

> What this policy covers
>
> We will pay on behalf of an **INSURED** all sums an **INSURED** must legally pay as damages because of a **WRONGFUL ACT** that results in a **CLAIM** first made against an **INSURED** and reported to us during the **POLICY PERIOD.**
>
> **WE** have the right and duty to defend any suit asking for these **DAMAGES. WE** will investigate and settle any **CLAIM WE** consider appropriate. If the claim is exhausted before the conclusion of any **CLAIM**, we have the right to withdraw from further defense of the **CLAIM.**

> We will do this by tendering control of the defense to **YOU**. **OUR** payment of, or **OUR** offer to pay, the limits available to any **CLAIM** ends **OUR** duty to defend or settle. (Vol. 1, p. 34, emphasis added).
>
> * * *
>
> "Wrongful Act" means:
>
> (1) any negligent act, error or omission arising out of professional services rendered or that should have been rendered by an insured,.... (Vol. I, p. 35).

On June 4, 1993, Manatee Insurance Company was placed in receivership, (R. Vol. I, p. 16, ¶1) and on May 20, 1994, it was subsequently declared insolvent and ordered liquidated. (R. Vol. I, p. 17). The Department of Insurance was appointed as Manatee's receiver (R. Vol. I, pp. 16-28) and was authorized *inter alia* to "Coordinate the operation of the receivership with the Florida Guaranty Association pursuant to Part II of Chapter 631, Florida Statutes (1993)" including "contract[ing] with the guaranty association to carry out the purposes of Chapter 631." (R. Vol. I, p. 20, ¶1). Following entry of the May 20, 1994 order of liquidation, FIGA undertook the AB law firm's defense. (R. Vol. I, p. 12, ¶7).

Manatee spent somewhat less than $200,000 on defense costs before it was declared insolvent. (R. Vol. II, pp. 232, ¶ 2). Under the original $1,000,000 declining balance policy, this left somewhat more than $800,000 available for indemnity. When FIGA arrived on the scene, it announced that all defense costs would be

deducted from the $300,000 it had available for indemnity. FIGA asserted that every further dollar spent on its attorneys in the defense of its insured would decrease the amount it had available to Mrs. Rosen as damages. (Vol. I, p. 15, ¶ 11). As FIGA's senior claims examiner Sam Allen declared:

> Q. [A]s $300,000. was expended in defense of AB law firm in fees and costs, how much was available in your view to pay as indemnity for AB law firm?
>
> Mr. Dittmar [FIGA counsel]: Form.
>
> A. Okay. If I understand, you are asking the question, <u>if we expended $300,000. in the defense of the claim, how much would be left to indemnify the insured?</u>
>
> Q. <u>That's correct.</u>
>
> A. <u>There would be zero.</u>
>
> Q. Okay. If we agree that $262,000 had been reasonably expended in the Defense of AB Law Firm up until the time of settlement, [of the underlying action], <u>is it your position that only $39,000 remained for either the defense or indemnity of AB Law Firm in the suit that was known as Rosen versus AB Law Firm?</u>
>
> A. <u>That is correct.</u> (Sam Allen depo. 10/30/97, p. 14, emphasis added).

The underlying lawsuit lasted more than four years, giving rise to various interlocutory appeals, and other lawsuits when the AB law firm and its principals began transferring their assets. (R. Vol. I, pp. 79-80).

The total bills for worthless services rendered by AB law firm to Rosen totaled nearly $340,000., of which Rosen paid $269,000.

At the time of trial, Mrs. Rosen’s economic damages alone were close to $600,000. This figure did not include attorneys’ fees, prejudgment interest, costs, and an amount due Mrs. Rosen for her mental pain and suffering on a negligent supervision claim when AB law firm’s office manager tried to extort money out of her by “threaten[ing] to reveal confidences and secrets to the opposing parties, and threaten[ing] her with groundless criminal prosecution.” (R. Vol. I, p. 80).

FIGA retained the Walton Lantaff firm and paid it approximately $261,000 in defense of its insured pretrial. (Sam Allen depo. p. 7-8). The Walton Lantaff firm reported to FIGA’s senior claims examiner directly and kept him informed as to the results of discovery and all court hearings. (Sam Allen. depo. pp. 8-9). On the eve of a trial anticipated to be lengthy, FIGA informed its insured that it had only $39,000 left for both defense and indemnity. (Sam Allen depo. pp. 39-40). This was based on FIGA’s legal interpretation of the policy and statutes. (R. Vol. I, p. 15, ¶11).

As to what its intentions were when the $39,000. was exhausted, and what it told its insured, FIGA’s senior claims examiner admitted that the Walton Lantaff firm projected that more than $39,000 would be expended in trying the lawsuit, (Sam Allen depo pp. 37-38, 40), and that FIGA informed its insured in no uncertain terms that “upon the complete expenditure of the funds under the FIGA cap by FIGA, that [the insured] would be obligated

to take on the responsibility of providing its own defense." (Sam Allen depo. p. 39). FIGA also asserted that it had no further duty to defend its insured after exhaustion of the $300,000, inclusive of its own defense costs. (Sam Allen depo. p. 35-36, emphasis added). It stated unequivocally that "FIGA would not be defending after the expenditure of the amount under the FIGA cap and ... it would be the insured's responsibility to defend itself." (Sam Allen depo. p. 40).

At that point, Rosen's counsel and the Walton Lantaff law firm agreed on the following terms in a written settlement agreement:

(1) FIGA would pay $39,000 (or the balance it claimed remained available) over to Rosen immediately (R. Vol. I, p. 162, ¶1);

(2) Rosen would take a final judgment against AB law firm in the amount of $261,000, Id. at ¶2;

(3) The Rosen judgment would not create a lien or encumbrance against the law firm, Id. at ¶2; and

(4) Rosen would not execute on that judgment against the firm, but would file suit against FIGA in Jacksonville within 60 days on the limited issue of whether the FIGA claims cap of $300,000. was inclusive of the costs expended in defense, or whether these were separate and independent obligations requiring FIGA to pay Mrs. Rosen the full $261,000. judgment amount. (R. Vol. I., p. 161-176).

Mrs. Rosen agreed to the settlement because:

> [T]he underlying lawsuit had lasted more than four years, had given rise to two interlocutory appeals, had spawned at least two other lawsuits, was likely to have taken a month or two to try, was certain to give rise to another appeal and – this is one of the

> most important considerations, if [she] had prevailed against AB law firm [she] would have had to sue FIGA anyway. The assets of AB law firm and its principals had been repeatedly transferred and were the subject of a separate fraudulent transfer case. Rather than try a case for a month, attempt dubious collection from a Defendant who had hidden assets <u>and</u> sue FIGA, [she] agreed to skip these intervening steps and proceed directly to suit against FIGA. (R. Vol. I, p. 8, 10).

FIGA not only knew that this agreement was being negotiated, it reviewed the settlement documents exchanged between the parties at least three times before the agreement was finalized and signed. (Sam Allen depo. p. 21-23). FIGA specifically told its insured that it did not object to the settlement agreement, because "if he could settle and protect himself, that would be the best thing for him." (Sam Allen depo. p. 28). FIGA termed the agreement atypical, understanding that it "was an agreement that would protect [its] insured for the remainder of the monies that [it] had available to settle the claim." (Sam Allen depo. p. 25).

The agreement was signed by multiple persons, including lead defense counsel who signed as "David K. Tharp, Esq. for Walton, Lantaff <u>et al</u>." (R. Vol. I, p. 126, emphasis added). Mr. Tharp agreed that he represented <u>both</u> AB law firm and FIGA, at the time he entered the stipulation and settlement agreement:

> Q. In Rosen versus AB law firm, were you representing FIGA?
>
> A. <u>I was representing both AB law firm and FIGA, yes.</u>
>
> Q. And when you entered the stipulation that

we've identified before, you were representing FIGA as well?

A. I believe that I was representing both of them, yes.

Q. And just so that I understand, in representing FIGA in entering the stipulation and settlement agreement, FIGA did not prohibit you from entering this agreement, correct?

A. That's my recollection, yes. (David Tharp depo. p. 12, emphasis added).

A second lawyer from the Walton Lantaff firm confirmed the law firm's signature on behalf of "the insured law firm and the guaranty association." (Gene Kissane depo, p. 25).

As to the impact of the "no-lien or execution" of the judgment provision, the agreement provided, in pertinent part, that "The foregoing is not intended, nor should it be construed, to prejudice the potential claim, whether valid or invalid, that Bonnie Rosen may decide to pursue as against FIGA." (R. Vol. I, p. 163, ¶2). Similarly, with respect to dismissal of the underlying suit, the agreement provided that it "[D]oes not impair the judgment referenced in paragraph no. 2 ... and thus shall not impair Bonnie Rosen's right to pursue a lawsuit, inclusive of a claim for attorneys' fees if proper, against FIGA ...." (R. Vol. I, p. 165, ¶7). With respect to ¶27 relieving the AB law firm's responsibility to pay further monies on the claim, the agreement stated that it was not "intended, nor should it be construed, to prejudice the potential claim, whether valid or invalid, that Bonnie Rosen may decide to pursue as against FIGA." (R. Vol. I, p.

174, ¶28). FIGA specifically reviewed this language <u>before</u> the agreement was signed. (Sam Allen depo. p. 28).

Rosen complied with the terms of this agreement. On February 21, 1997, she instituted the present declaratory judgment action in Duval County against FIGA. (R. Vol. I, pp. 1-5). Rosen asserted that she was in doubt as to her rights on the following issues:

> (a) whether a "declining balance" of indemnity under a professional liability policy continues to decline from the original face amount of indemnity after FIGA receivership or, in the alternative, when the coverage amount of indemnity exceeds $300,000., whether indemnity declines from the statutory amount of $300,000 after FIGA receivership;
>
> (b) whether she was entitled to recover her reasonable costs and attorneys' fees in the prosecution of this action; and
>
> (c) whether she was entitled to recover her reasonable attorneys' fees and costs associated with procuring the judgment against FIGA's insured. (R. Vol. I, pp. 1-5).

In its answer, FIGA clearly set forth its position that it was <u>deducting its own defense costs</u> from the $300,000 available in indemnity for Mrs. Rosen's "covered claim." It wrote:

> 11. Pursuant to Fla. Stat. secs. 631.54(3) and 631.57(1)(a)(2), a "covered claim" for which FIGA is responsible is one that is within the coverage of the insolvent insurer and less than $300,000. Pursuant to Fla. Stat. sec. 631.57(1)(b), FIGA is "deemed the insurer to the extent of its obligation on the covered claim, and, to such extent, shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent." <u>Accordingly, FIGA upon taking over this claim had only $300,000 in coverage for AB LAW FIRM, and was entitled to</u>

> <u>deduct its own defense costs of $261,000 from the policy amount just as the insolvent insurer would have been able to deduct defense costs.</u> (R. Vol. I, p. 15, ¶11, emphasis added).

As an affirmative defense, FIGA further claimed that Rosen had "no enforceable claim" against AB law firm (and therefore no claim against FIGA) and that the settlement agreement reached by Rosen and FIGA's insured "released" and "barred" this suit. (R. Vol. I, p. 13-14). FIGA also termed the settlement agreement entered into by the Walton Lantaff firm (with FIGA's knowledge) to be "collusive", and the amount of the consent final judgment to be "excessive". (R. Vol. I, pp. 14-15, ¶9-10).

The parties filed cross-motions for summary judgment, and briefed the legal issues. (R. Vol. I, pp. 60-98, 99-126, 136-193). In her summary judgment motion, Rosen claimed that (1) the $261,000 consent judgment against and settlement agreement entered with the AB law firm was collectible against FIGA; (2) that the available limit of indemnity did <u>**not**</u> decline from $300,000 as FIGA's defense costs were incurred; (3) that the settlement agreement was not collusive or excessive in amount; and (4) that the policy exclusions did not apply to Rosen's action against FIGA. (R. Vol. I, p. 62).

FIGA cross-moved for summary judgment claiming *inter alia* that <u>Fidelity and Cas. Co. of New York v. Cope</u>, 462 So. 2d 459 (Fla. 1985) and <u>Kelly v. Williams</u>, 411 So. 2d 902 (Fla. 5th DCA), <u>rev.</u>

den, 419 So. 2d 1198 (Fla. 1982), barred the trial court's consideration of Mrs. Rosen's action. (R. Vol. I, pp. 99-100). FIGA acknowledged that the parties "were clearly trying to preserve a right for Rosen to pursue a claim against FIGA," and that they "did not intend to wipe out a claim against the insurer...." (R. Vol. I, p. 107). It asserted nonetheless that this "was the effect of their agreement," Id. and that since "FIGA was not a party to the stipulation, [it was] free to point out the fallacy in the parties attempt." (R. Vol. I, p. 105).

In a detailed order, the trial court agreed with FIGA in all respects and entered final summary judgment in its favor. (R. Vol. II, pp. 231-42). Acknowledging Mr. Tharp's testimony that he represented both FIGA and the AB law firm at the time he executed the settlement agreement, the trial court first concluded, nonetheless, that Tharp "did not sign the agreement as to FIGA." (R. Vol. II, p. 233). Second, the court acknowledged the testimony of FIGA's senior claims adjuster that he communicated FIGA's declining balance theory to FIGA's insured and informed the insured that it would be obligated to provide its own defense after the $39,000 remaining was exhausted. (Vol. II, p. 233). However, the trial court concluded that FIGA had not anticipatorily breached its duty to defend its insured because "no final decision had been reached...." (R. Vol. II, p. 238). Because there was no anticipatory breach of FIGA's duty to defend its insured, the trial court reasoned that Rosen "released" her claims against FIGA by

entering into the settlement agreement, pursuant to Fidelity and Cas. Ins. Co. of New York v. Cope, 462 So. 2d 459 (Fla. 1985) (R. Vol. II, p. 236). Citing the language of the Manatee/Rumger policy, the trial court further held that Rosen "could not prevail upon her contention that FIGA must pay more than $300,000 *in toto* ...." (R. Vol. II, p. 240).

On appeal, The First District held, as a matter of law, that Cope barred all of Rosen's claims, and thus affirmed the summary judgment without reaching the merits. This Court granted Mrs. Rosen's petition for review.

STANDARD OF REVIEW

On review of a final summary judgment, the trial court's findings of fact and conclusions of law are both considered *de novo*. See e.g. Coleman v. Florida Ins. Guar. Ass'n, Inc., 517 So. 2d 686, 690 (Fla. 1988) (question of the extent of coverage under an insurance policy "is a question of law and is therefore subject to plenary review"); Peacock Const. Co., Inc. v. Modern Air Conditioning, Inc., 353 So. 2d 840, 842 (Fla. 1977) ("interpretation of a document is a question of law rather than fact"); see also Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376 (Fla. 5th DCA 1998) (interpretation of a Florida statute is "purely a legal matter and therefore subject to *de novo* review").

SUMMARY OF THE ARGUMENTS

The Florida Insurance Guaranty Association is funded entirely

by contributions from member insurers. However, it does not exist for their benefit, but for the benefit of the public. FIGA's primary purpose is to prevent delay in the payment of claims, and to protect policyholders and claimants alike from financial loss due to an insurer's insolvency.

Because FIGA stands in the shoes of an insolvent insurer, any ambiguous language in the insurance policy must be construed against FIGA. This is entirely consistent with the remedial purpose of the FIGA statute, which mandates liberal, not strict construction of the FIGA Act as well.

The present appeal raises several issues of great public importance. First, both the statutory language and the public policy behind the FIGA Act renders <u>Cope's</u> analysis inapplicable in the FIGA context. A claimant has a direct cause of action against FIGA on a "covered claim" and that cause of action was preserved by the settlement agreement between Rosen and FIGA's insured. Strong public policy favors agreements designed to simplify, shorten or settle litigation and save costs to the parties. That was precisely the nature of the agreement between the parties here. FIGA was not entitled to collaterally attack the form of the settlement <u>or</u> judgment – even though the parties' agreement contained a clause that the claimant would not execute against the insured, and would look solely to FIGA to recover. The "covenant not to execute" should have been treated as a binding stipulation, not as a release.

Once this case was accepted for review, this Court may review any issue arising in the case, which was either preserved or necessary to decide the case. The issues raised before this Court were so preserved and raise legal issues of great public importance and policy which should be addressed by this State's highest authority.

Turning to the merits of Mrs. Rosen's action, the statutory definition of "covered claims" does not include defense costs. This is a legal issue which requires no remand for determination. As a matter of law, the trial court erred in holding that FIGA was entitled to deduct its own defense costs from the $300,000. it had available to pay this claimant on a covered claim. Indeed, the only state court to address this issue has rejected just such an interpretation on the basis that it "lend[s] itself to abuses clearly not intended by the legislature." See Missouri Property and Cas. Ins. Guar. Ass'n (MIGA) v. Petrolite Corp., 918 S.W. 2d 869, 873 (Mo. Ct. App. 1996).

This abuse is readily seen from the present case. On the eve of a complicated trial, FIGA abandoned its insured, by making it choose between defense and indemnity. FIGA anticipatorily breached its duty to defend its insured, as a matter of law, when it told its insured on the eve of trial that it had minimal funds remaining and that thereafter the insured would be required to defend itself. Indeed, in Arizona Property & Cas. Ins. Guar. Fund v. Helme, 153

Ariz. 129, 735 P.2d 451 (Ariz. 1987) (*en banc*), a case of first impression, the Arizona Supreme Court reached this very conclusion under a similar statute in a similar case. Once FIGA abandoned its insured, the insured was free to enter a reasonable settlement with the claimant.

The trial court further erroneously entered judgment in FIGA's favor in the face of evidence from the defense law firm that it executed the settlement with FIGA's knowledge and tacit consent. This evidence should have precluded FIGA's collateral attack on the merits of the agreement, and warranted entry of judgment in Rosen's favor. At a minimum, however, if there were any doubt as to resolution of these factual issues then that doubt had to be resolved in Rosen's favor at a trial. The trial court was precluded from weighing the evidence and determining these factual issues in FIGA's favor.

Finally, Mrs. Rosen was entitled to the attorney's fees occasioned by FIGA's denial of her covered claim. Construing section 627.428, Fla. Stats. *in pari materia* with the literal language, strong public policy, remedial purpose, and liberal construction accorded the FIGA Act, it is clear that the FIGA Act expands the category of persons entitled to recover fees to include claimants. The statutory purpose of protecting claimants from financial loss would be defeated by requiring the claimant to bear fees arising out of her prosecution of a valid claim.

ARGUMENTS

I. COPE HAS NO APPLICATION TO SUITS AGAINST FIGA FOR FAILURE TO PAY "COVERED CLAIMS."

In Fidelity & Cas. Co. of New York v. Cope, 462 So. 2d 459 (Fla. 1985), the issue before this Court was whether an injured party who had secured a judgment in excess of a tortfeasor's insurance coverage could maintain a "bad faith" excess claim against the tortfeasor's insurer when the injured party executed a release of his claims against the tortfeasor. Noting that the essence of a "bad faith" insurance suit (whether brought by the insured or the injured party standing in his shoes) is an insurer's breach of duty which results in the insured's being exposed to an excess judgment, this Court held that "absent a prior assignment of the cause of action, once an injured party has released the tortfeasor from all liability, or has satisfied the underlying judgment, no such action may be maintained." Id. at 459-60 (emphasis added). It reasoned that since the stipulation executed by the parties completely released the insured, the insured had no risk of loss from an excess judgment, and thus "no cause of action for bad faith remained for anyone." Id. at 459.

In doing so, the Court approved the holding of Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA), rev. denied, 419 So. 2d 1198 (Fla. 1982), a split decision of the Fifth District Court of Appeal which also arose in the "bad faith" context. The dissenting

voice in Kelly was Judge Cowart.

In an extensive analysis of the relationship between all the parties, as well as Florida law concerning bad faith excess claims, Judge Cowart concluded that assignments of claim were no longer necessary even in the bad faith context. He reasoned that:

> The normal scenario in an "excess judgment" situation starts with the injured party, as Plaintiff, bringing suit against the alleged tortfeasor and his insurer, as co-defendants. If the action results in a judgment for plaintiff in excess of the tortfeasor's insurance coverage, the defendant tortfeasor is potentially accountable for such excess. When the insurance company has acted in "bad faith" during prejudgment settlement negotiations, the original defendant tortfeasor has a cause of action against the company for the amount of the original judgment in "excess" of the policy limits. (Citation omitted).
>
> Often the defendant tortfeasor is judgment proof and the defendant's cause of action back against the insurance company is of more value to the original plaintiff (judgment creditor by now) than the original judgment. Therefore, in the past, releases were often given in exchange for an assignment of the cause of action (citations omitted). However, an assignment is no longer necessary since the judgment creditor is now allowed to assert a cause of action for bad faith settlement tactics under third-party beneficiary concepts. Thompson v. Commercial Union Ins. Co. of N.Y., 250 So. 2d 259 (Fla. 1971). Id. at 906, n.2 (emphasis added).

Noting that the settlement agreement between the claimant and the insured party/defendant specifically stated that their settlement would not preclude a bad faith claim, Judge Cowart concluded that the trial court's dismissal of the claim actually

thwarted the parties' intent. Id. at 908. He deemed this to be a "harsh result," resulting in a "windfall" to the insurer, Id. at 908, n.2, which "pave[d] the way for unfair negotiation tactics in future cases." Id. at 90.

In Cunningham v. Standard Guar. Ins. Co., 630 So. 2d 179, 182 (Fla. 1994), this Court subsequently concluded that a stipulation between the claimant and the insured to preserve a bad faith claim dispensed with the necessity for the claimant to proceed to trial and procure an excess judgment. This Court distinguished Cope on the basis of this stipulation "which preserved the underlying claim" and concluded that the stipulation should be given force and effect. In doing so, it reasoned that:

> This Court has looked with favor upon stipulations designed to simplify, shorten, or settle litigation and save costs to parties. Such stipulations should be enforced if entered into with good faith and not obtained by fraud, misrepresentation or mistake, or against public policy. (Citations omitted).

In the instant case, the District Court ignored the stipulation between the claimant and FIGA's insured that Rosen's FIGA claim would be preserved. It further expanded the holdings in Cope and Kelly beyond the limited "bad faith" context in which they arose, to swallow a new line of cases arising in the FIGA context. The Third District Court of Appeal reached the opposite conclusion in Florida Ins. Guar. Ass'n v. Giordano, 485 So. 2d 453 (Fla. 3d DCA 1986). The Third District reasoned that Cope and its progeny were inapplicable in a FIGA suit because it was "not a bad faith

action against the insurer and there is no excess judgment involved here." Id. at 457. The statutory language of the FIGA Act, its broad remedial purpose, and sound public policy support the Third District's decision.

In December 1969, the National Association of Insurance Commissioners ("NAIC") promulgated the "Post-Assessment Property and Liability Insurance Guaranty Association Model Act." ("The Model Act"). Havens, "Insurance Guaranty Laws: An Update on Litigation," 16 The Forum 1183 (ABA 1981). The impetus for drafting the Model Act was twofold: (1) a response to the social harm that results from insurance companies becoming insolvent, see Sands v. Pennsylvania Ins. Guaranty Ass'n, 283 Pa. Super. 217, 423 A. 2d 1224, 1225-26 (Pa. 1980); and (2) the NAIC's fear of the passage of federal legislation dealing with insurance company insolvencies, which would have preempted the field. See Report of B5 Industry Advisory Committee, II NAIC Proceedings pp. 316-18 (1971).[2]

The Model Act was "designed to provide a means of assisting in the detection and prevention of insurer insolvencies" and "to ease the pain and suffering of insureds, beneficiaries, and injured

[2] This report reminded "those who would weaken the present NAIC bill that it is the very kind of insensitiveness to the public's plight which spurred the contemplated federal program in this area" and "even today those who favor a federal guaranty bill point to the $100. deductible in the NAIC Model Bill as an example of the states' inability to adequately protect the public...." Id. at 318.

third-party claimants if the insurance company which would normally respond to their problems becomes insolvent". Havens, "Insurance Guaranty Laws: An Update on Litigation", 16 The Forum, p. 1183 (ABA 1981). Most states thereafter promptly adopted laws patterned on the Model Act. Id. at 1183.[3]

---

[3] As of March 1978, forty-five states had adopted an insurance guaranty act that was substantially similar to the NAIC Model Act. See Sands v. Pennsylvania Ins. Guaranty Ass'n, 423 A.2d at 1226. That number has grown. Alabama Insurance Guaranty Ass'n Act, §27-42-1, *et seq.*, (Acts 1980); Alaska Insurance Guaranty Ass'n Act., §21.80.010 *et seq.* (1998); Arizona Administration of Insolvency, 7 Ariz Rev. Stats. Ann. §20-661 *et seq.*, (1977, as amended by Laws, 1999); Arkansas Property & Casualty Ins. Guaranty Act §§23-90-101 *et seq.* (1999); Colorado Ins. Guaranty Ass'n Act. §10-4-501 *et seq.*, (Laws 1971); Connecticut Insurance Guaranty Ass'n Act. §380-836 *et seq.*, (Amended eff. 7/1/97); District of Columbia Property and Liability Insurance Guaranty Association, D.C. Code §35-3901 *et seq.*, (1981 ed. as amended eff. 1997); Delaware Insurance Guaranty Ass'n Act, 18 Del. Code Ann. §4201 *et seq.*, (1999); Hawaii Insurance Guaranty Association Act., 9 Haw. Rev. Stats. Ann. §431.16-101 *et seq.*, (1987); Idaho Insurance Guaranty Ass'n, 7 B Idaho Code 41-3601 *et seq.*, (1970); Illinois Insurance Guaranty Fund, Smith-Hurd Illinois Compiled Stats. Ann., 215 IL CS 5/532 *et seq.*, (eff. 7/21/1971); Indiana Insurance Guaranty Ass'n Law of 1971, §27-6-8-1, *et. seq.* (1971); Iowa Ins. Guaranty Ass'n, ICA §515B.1, *et. seq.* (1971); Kansas Insurance Guaranty Ass'n Act, 40-2901 *et seq.* (1970); Kentucky Insurance Guaranty Ass'n, KRS 304.36-010, *et. seq.* (1983 & 1997 Supp.); Louisiana Ins. Guaranty Assoc. Law, R.S. 22: 1375 *et seq.* (2000); Maine Ins. Guaranty Ass'n Act, 24-A §4431 *et seq.* (2000); Maryland Property & Casualty Ins. Guaranty Corp., §9-301 *et seq.* (1997); Mass. Insurers Insolvency Fund, 175 D §1 *et seq.*, (1998); Michigan Property and Casualty Guaranty Assoc. Act. §500.7901, *et seq.*, (2000); Minnesota Ins. Guaranty Ass'n, §60c.01 *et seq.*, (1996); Mississippi Ins. Guaranty Assn §83-23-101 *et seq.* (1999); Missouri Property and Casualty Guaranty Ass'n Act, §375.771, *et seq.* (2000); Montana Ins. Guaranty Ass'n §33-10-101, *et seq.*, (1999); Nebraska Property & Liability Ins. Guaranty Ass'n Act, §44-2401 *et seq.* (1999); Nevada Insurance Guaranty Association §687A. 010, *et seq.* (1999); New Hampshire Insurance Guaranty Association, §404-B:1, *et seq.* (1998); New Jersey Property Liability Insurance Guaranty Association §17:30A-5,

Florida's Insurance Guaranty Association Act, "the FIGA Act" was enacted in 1970, and contains many of the Model Act provisions. See §631.50 *et seq.*, Fla. Stats. (1997); Laws 1970, c. 70-20 §1. FIGA is a nonprofit corporation created by statute, and composed of all insurers licensed to transact business in this state. §§631.51(3)(4), 631.55(1), Fla. Stat. (1997). It is funded entirely from assessed contributions from member insurers. §§631.51(4), 631.55(1), 631.57(3)(a), Fla. Stat. (1997). However, the underlying purpose of the statute is consumer protection, i.e., to "[p]rovide a mechanism for the payment of covered claims under certain insurance policies, to prevent excessive delay in payment and to avoid financial loss of claimants or policyholders because

---

et seq. (2000); New Mexico Property and Casualty Ins. Guaranty Fund, §59A-43-1, *et seq.* (1999); New York Property Casualty Insurance Fund, McKinney's Insurance Law §§7602(2) *et seq.* (1998); North Carolina Ins. Guaranty Association Act, N.C. Gen. Stat. §58-48-1, *et seq.*, (1999); North Dakota Ins. Guaranty Association, §26.1-42.1, *et seq.* (1999); Ohio Property & Casualty Ins. Guaranty Ass'n, Page's RSA §3995.01 *et seq.* (1996); Oklahoma Property & Casualty Ins. Guaranty Ass'n Act, 36 §2001 *et seq.* (1999); Oregon Insurance Guaranty Ass'n, §734.510, *et seq.* (1999); Pennsylvania Ins. Guaranty Ass'n, 40 P.S. §221.1 *et seq.* (1999); Rhode Island Insurers' Insolvency Fund Act, §27-34-1, *et seq.* (1999); South Carolina Ins. Guaranty Ass'n Act, §38-31-30 *et seq.* (1999); South Dakota Ins. Guaranty Assoc, §58-29A-1 *et seq.* (1999); Tennessee Insurance Guaranty Association Act, Tenn. Code An. 56-12-101 *et seq.* (1998); Vermont Property & Casualty Ins. Guaranty Ass'n, T.8 §3611 *et seq.* (1984); Virginia Property & Casualty Ins. Guaranty Ass'n, §38.2-1600 *et seq.* (1999); Washington Insurance Guaranty Ass'n Act, RCWA 48.32.010 *et seq.* (1999); West Virginia Ins. Guaranty Ass'n Act, §33-26-1 *et seq.* (1996); Wyoming Ins. Guaranty Ass'n Act, §26-31-101 *et seq.* (1999).

of the insolvency of an insurer....” §631.51(1), Fla. Stats. (1997).

FIGA thus does not exist for the benefit of member insurers – but for the benefit of the public. O’Malley v. Florida Ins. Guaranty. Ass’n, 257 So. 2d 9, 11 (Fla. 1971). Its purpose is

> [T]o aid and benefit numerous citizens many of whom comply with state requirements in obtaining casualty and other insurance coverage for themselves and have suffered loss of the insurance protection because of the insolvency of their insurors. Id. at 11.

When an insurer is deemed insolvent, FIGA becomes the insurer with respect to the insurer’s obligations on “covered claims”. §631.51(1)(a)(3)(b), Fla. Stat. (1997). FIGA is deemed to “stand in the shoes” of the insolvent insurer subject to all of the same rights and liabilities. Peoples v. Florida Ins. Guar. Ass’n., Inc., 313 So. 2d 40, 41 (Fla. 2d DCA 1975), cert. den., 327 So. 2d 34 (Fla. 1976); see also Kuvin, Klingensmith & Lewis, P.A. v. Florida Ins. Guaranty Ass’n, Inc., 371 So. 2d 214 (Fla. 3d DCA 1979).[4]

The FIGA Act expressly states that it is to be “liberally construed” to effect its purposes, which “shall constitute an aid and guide to interpretation.” §631.53, Fla. Stats. (1997). The

[4] There are certain exceptions, including FIGA’s immunity from “any penalties or interest,” §631.57(1)(a)(3)(b), Fla. Stat. (1997), and “bad faith”. §631.66, Fla. Stat. (1997); but see Florida Ins. Guar. Ass’n v. Renfroe, 568 So. 2d 962 (Fla. 1st DCA 1990), rev. den., 581 So. 2d 1308 (Fla. 1991) (allowing recovery of attorneys’ fees).

Florida legislature has thus mandated, by the statute's enactment, that courts give the FIGA Act an interpretation which affords the **most** protection to claimants and policyholders alike.

A. Rosen had a direct cause of action against FIGA which was not released.

As a matter of law, Cope simply has no application in the FIGA context. There are significant differences between FIGA suits and insurance bad faith claims. To begin with, a suit against FIGA is a suit on a direct cause of action to obtain payment of a "covered claim." See Couch on Insurance 3d, §6:28 at p. 6-58 (1997):

> If a guarantee fund fails to pay a covered claim or ignores its obligation to protect the insureds or the insolvent company, the fund can be sued by the insured and/or third party claimants. Theoretically, the lawsuit is to force the fund to comply with its statutory duty. The fund cannot be sued for liability beyond its duty to pay covered claims, however. (Emphasis added).

The statute is not limited to direct actions brought by insureds. This is shown first by the literal language of the FIGA Act, which defines a "covered claim," any "unpaid claim...which arises out of, and is within the coverage, and not in excess of the applicable limits of an insurance policy.... §631.54(3), Fla. Stats. (1997).

It is likewise shown by the statute's underlying purpose, which is set forth in the alternative as the prevention of financial loss to "claimants **OR** policyholders." §631.51(1), Fla. Stat. (1997) (emphasis added). Other provisions of the Act speak

in similar terms. See §631.60(1), Fla. Stat. (1997) ("[E]very insured **OR** claimant seeking the protection of this part shall cooperate with the association to the same extent as such person would have been required to cooperate with the insolvent insured."); §631.61(1), Fla. Stats. (1997) (any person "having a claim against an insurer" not required to exhaust rights).[5]

It is also reflected by the manner in which other states have interpreted their own versions of the Model Act. Thus, in Connecticut Ins. Guaranty Ass'n v. Union Carbide Corp., 217 Conn. 371, 585 A. 2d 1216, 1219 (Conn. 1991), the Connecticut Supreme Court rejected its association's interpretation of a similar act, which purported to limit direct actions to insured policyholders. The Court relied upon the statutory reference to "the claimant or insured" to refute this argument, and found *inter alia* that:

> A similar recognition of the right of either a claimant or an insured to present covered claims is contained in §38-278(I)(a)(ii) which establishes the $300,000 limit per claim and refers to CIGA's obligation "to any policyholder or claimant." Id. at 1220.

Accord New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc., 142 N.H. 573, 705 A. 2d 1190, 1193 (N.H. 1998) ("A construction of the statute that equated 'claimant' with 'insured' or 'policyholder' would contravene the fundamental principles 'that all of the words

---

[5] When the legislature was dealing solely with the insured and not a claimant in the FIGA Act, it did not hesitate to say so. See §631.60(4), Fla. Stat. (1997) (requiring any release of the association and its insured to be specific).

of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words."); State ex rel. Watkins v. Eighth District Court of Appeals, 82 Ohio St. 3d 532, 696 N.E. 2d 1079, 1083 (Ohio 1998) (purpose of Ohio Insurance Guaranty Ass'n Act was "to protect insureds and third party claimants from a potentially catastrophic loss due to the insolvency of a member insurer."); H.K. Porter Co., Inc. v. Pennsylvania Ins. Guar. Ass'n, 75 F.3d 137 (3rd Cir. 1996) (term "covered claim" encompasses the underlying claims of tort victims and **not** merely insureds). Thus, a third party victim has a direct - not derivative - claim against FIGA for its loss.

Pursuant to section 631.193, Fla. Stat. (1997), the filing of a FIGA claim "constitutes a release of the insured from liability to the claimant to the extent of the coverage or policy limits provided by the insolvent insurer." However, this release of the insured, expressly "does not operate to discharge the Florida Insurance Guaranty Association or any other guaranty association from any of its responsibilities and duties set out in this chapter." §631.193, Fla. Stats. (1997) (emphasis added). In fact, §631.60(4), Fla. Stat. (1997) requires releases of the association to be specific. Cope's release analysis thus cannot be applicable to wipe out a covered claim against FIGA by implication. Such claims are preserved as a matter of statute.

The application of Cope under the circumstances presented here

is also contrary to sound public policy. Here, the claimant and insured entered into a stipulation which was calculated to preserve Rosen's claim against FIGA, to simplify and shorten the proceedings and to save costs to all parties. In three separate places in their agreement, the claimant and insured agreed that it was **not** intended to prejudice Rosen's FIGA claim. Indeed, FIGA's motion for summary judgment repeatedly acknowledged that the parties "did not intend to wipe out a claim against the insurer" and "were clearly trying to preserve a right for Rosen to pursue a claim against FIGA." (R. Vol I, p. 107). However, FIGA argued that "the parties were mistaken about the effect of their agreement," Id., and cited Cope for the proposition that Rosen had no enforceable rights. Id. at 105.

It is respectfully submitted that FIGA's interpretation of Cope is simply wrong, and should be roundly rejected. As in Cunningham v. Standard Guaranty Ins. Co., 630 So. 2d at 182, the parties' stipulation was sufficient to preserve Rosen's claim, and was enforceable so long as entered in good faith, without evidence of fraud, misrepresentation or mistake.

There could further be no claim of "fraud, misrepresentation or mistake" by FIGA where some three separate drafts were given to FIGA in advance of the agreement's execution, and it was reviewed by both FIGA's senior claims examiner and its counsel. The agreement between the parties here should have been treated as a

binding contract a la Cunningham, rather than as a release.

In sum, Judge Cowart's prediction in his Kelly dissent has now come to fruition. Cope and Kelly have been misapplied and have paved the way for unfair negotiation tactics. The beneficiary of these tactics here is FIGA which, ironically, is the entity charged by statute with acting in the best interests of both the claimant and the insured. Instead, the $261,000 saved by FIGA here inures only to the benefit of its member insurers. This result cannot and should not be sustained.

B. Figa Anticipatorily Breached its Obligations to its Insured, Triggering the Settlement

It is well-established that an insurer's duty to defend its insured is governed by the complaint's allegations. National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977). Once an insurer's duty to defend arises, it continues throughout the case unless the claims giving rise to coverage have been eliminated from the suit. See Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810, 815 (Fla. 1st DCA 1985).

In the instant case, FIGA told its insured, on the eve of a trial anticipated to last several months, that it had only $39,000 remaining available for both defense and indemnity; and the insured thereafter "would be obligated to take on its responsibility of providing its own defense," and "if he could settle and protect himself, that would be the best thing for him." (Sam Allen depo. p. 28, 40).

The trial court erred in concluding that this warning was not an "abandonment" or "anticipatory breach" of contract. The Arizona Supreme Court addressed the virtually identical issue in Arizona Property and Cas. Ins. Guar. Fund v. Helme, 153 Ariz. 129, 735 P.2d 451 (Ariz. 1987) (en banc), a case of first impression.

Claimants brought a wrongful death action against doctors insured by Imperial. Under the Imperial policies, each of the doctors and their corporation were insured up to $3 million dollars per occurrence. When Imperial became insolvent, Arizona's equivalent of FIGA – the FUND – stepped in. Arizona defines a "covered claim" the same as Florida, but requires the Fund to pay no more than $99,900. on each covered claim (as opposed to Florida's $300,000 limit on each covered claim). Shortly before trial, the claimants notified the fund that they were treating the claim of each survivor against each doctor as a separate claim, and were thus seeking to recover the cap twice - for a total of $199,800.[6] Claimants notified the Fund that they were willing to settle for less than the $199,800 they considered to be the statutory limit, and that they were discussing settlement with the doctor's private counsel.

The Fund refused to settle, and took the position that its

[6] A.R.S. §20-661(3), A "covered claim" is "an unpaid claim ... arises out of, and is within the coverage, of an insurance policy" issued by an insolvent insurer. See also §631.54(3), Fla. Stat. (1997),defining a "covered claim" as an "unpaid claim ... which arises out of, and is within the coverage, and not in excess of the applicable limits of an insurance policy...."

liability was capped at a total of $99,900 for both claims. Thereafter, the claimants and the insureds entered into an agreement similar to that at issue. The doctors allowed the claimants to accept a stipulated judgment against them, together with a covenant not to execute.

The Fund paid the claimants $99,900., and then filed a declaratory judgment action asking the Court to determine that this was all it owed. This legal issue was determined adversely to the Fund. The case went up to the Arizona Supreme Court *inter alia* on whether the Fund's erroneous pronouncement of law constituted an "abandonment" of its insured. Holding squarely that it did, the Court noted that the Fund "admits it told its insured that it would pay only one covered claim." Id at 459. Since this "contraction of coverage" was based on the Fund's erroneous interpretation of the policy's 'occurrence' definition, the Court deemed the Fund to have "anticipatorily breached its contractual and statutory obligations as a matter of law." (Id. at 459, emphasis added).

As to where this act of anticipatory breach left the claimants as well as the insureds, the Court's legal analysis is directly on point, and thus detailed at length here:

> As a general matter, insurance carriers owe their insured three duties, two express and one implied. These are the duties to indemnify, the duty to defend, and the duty to treat settlement proposals with equal consideration (citations omitted). Any breach, actual or anticipatory, of these duties deprives the insured of the security

> that he has purchased because the breach leaves him exposed to personal judgment and damage which may not be covered or may exceed the policy limits. Accordingly, when such a breach occurs, the insured is generally held to be freed from his obligations under the cooperation clause. (Id. at 459, emphasis added).
>
> * * *
>
> No other rule is sensible. The insured exposed by his insurer 'to the sharp thrust of personal liability ... need not indulge in financial masochism...." (Id., citation omitted).
>
> * * *
>
> We do not hold that the insurer's anticipatory repudiation eliminates the insured's duty of cooperation so that the insured may enter any type of agreement or take any type of action that may protect him from financial ruin. We hold only that once the insurer commits an anticipatory breach of its policy obligations, the insured need not wait for the sword to fall and financial disaster to overtake. The insurer's breach narrows the insured's obligations under the cooperation clause and permits him to take reasonable steps to save himself. Among those steps is making a reasonable settlement with the claimant. So long as the settlement agreement is neither fraudulent collusive, nor otherwise against public policy, that insured has not breached the cooperation clause. (Id. at 460, emphasis added).

The present case is far stronger. FIGA told its insured on the eve of a lengthy trial that its policy limits were almost exhausted, and, upon its exhaustion, that the insured would be left to its own devices to defend itself. In FIGA v. Giordano, 485 So. 2d at 456, the Third District spoke to the "real jeopardy" and

precarious situation faced by an insured when FIGA affords less than its full statutory obligations. It wrote that, when faced with such intransigence, "it [was] not surprising that the insured chose to settle with the plaintiff" and "It was entitled to do so." (Emphasis added).

As a matter of law, FIGA's erroneous legal pronouncement constituted an anticipatory repudiation of the contract which authorized the insured to take reasonable actions to protect itself from this claim. This is what it did. The claim should now be enforced.

C. Figa Was Bound by All Terms of a Settlement Entered into with its Knowledge and Consent, but in Any Event, Evidence of Figa's Knowledge and Tacit Consent Precluded Entry of a Defense Summary Judgment.

Summary judgment is only appropriate when the movant conclusively demonstrates that there are no genuine issues of material fact remaining, with every inference drawn in favor of the party against whom summary judgment is sought. Rule 1.510, Fla. R. Civ. Proc.; Holl v. Talcott, 191 So. 2d 40 (Fla. 1966); Washington v. Fleet Mort. Corp., 631 So. 2d 364 (Fla. 1st DCA 1994). In Martino v. Florida Ins. Guaranty Ass'n, 383 So. 2d 942 (Fla. 3d DCA 1980), the Third District squarely held that FIGA was bound by a judgment entered against its insured "[n]otwithstanding the fact that the Florida Insurance Guaranty Association, Inc. was not a named party in the prior suit" where it participated in the

proceeding after the insurer was declared insolvent.

In the instant case, FIGA undisputably knew that settlement negotiations were going on, and received drafts of the agreement before it was signed. The settlement agreement reflects on its face, moreover that it was signed by "David Tharp for Walton Lantaff, et al." (emphasis added). Accordingly to Black's Law Dictionary, "et al" means "and others." Because it was unclear what "others," Mr. Tharp represented at the time, resort to parol evidence was required. Stein v. Miss Franie's, Inc., 417 So. 2d 726, 727 (Fla. 1st DCA 1982) (order of reversal dismissed where it was unclear in what capacity party signed, with directions for trial court to consider parol evidence on remand); see also Landis v. Mears, 329 So. 2d 323, 325 (Fla. 2nd DCA 1976). This evidence established without contradiction that Mr. Tharp was representing both FIGA and its insured at the time he executed the agreement.

> Q. In Rosen versus AB law firm, were you representing FIGA?
>
> A. I was representing both AB law firm and FIGA, yes.
>
> Q. And when you entered the stipulation that we've identified before, you were representing FIGA, as well?
>
> A. I believe that I was representing both of them, yes.
>
> Q. And just so that I understand, in representing FIGA in entering the stipulation and settlement agreement, FIGA did not prohibit you from entering into this agreement, correct?

> A. That's my recollection, yes. (David Tharp depo. p. 12, emphasis added).

The trial court acknowledged the existence of this testimony, but chose to ignore its effect, concluding that Tharp "did not sign the agreement as to FIGA." It is respectfully submitted that the trial court reached an erroneous conclusion with regard to the force and effect of this evidence, and that judgment should accordingly be entered in favor of Rosen.

If there were any doubt whatsoever in what capacity Mr. Tharp signed, however, this decision was a factual decision which was not the trial court's to make. See e.g. State, Dept. of Environmental Protection v. Burgess, 667 So. 2d 267 (Fla. 1st DCA 1995). In Coastal Petroleum Co. v. Chiles, 656 So. 2d 284 (Fla. 1st DCA 1995), summary judgment was reversed where the litigation involved the parties' understanding at the time a settlement was reached, because:

> The grant of summary judgment in favor of the state obviously involved the weighing and resolution of certain factual matters and the logical inferences therefrom, such as the expectation of the parties at the time the settlement was entered and the meaning and effect to be given to numerous documents submitted into evidence. (Id. at 285, emphasis added).

Here, the parties' settlement agreement expressly reflected their understanding that it would not impair Rosen's claims against FIGA. Indeed, the agreement stated this in three separate places. Where FIGA knew of and tacitly consented to these provisions

through its counsel, it should be estopped from contesting any of the terms of the agreement now. Martino v. FIGA, *supra*.

At a minimum, however, if there was any dispute over the capacity in which Mr. Tharp signed the settlement agreement, then this was an issue of material fact which precluded the entry of summary judgment in FIGA's favor.

II. FIGA'S DEDUCTION OF ITS OWN DEFENSE COSTS FROM THE AMOUNT DUE AND PAYABLE ON "COVERED CLAIMS" IS CONTRARY TO THE STATUTORY LANGUAGE AND PURPOSE OF THE FLORIDA INSURANCE GUARANTY ASS'N ACT, §631.50, *ET SEQ.*, FLA. STATS. (1997)

Once this Court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case. Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982); Miami Gardens, Inc. v. Conway, 102 So. 2d 622 (Fla. 1958); Vance v. Bliss Properties, 109 Fla. 388, 149 So. 370 (Fla. 1933) (appeal from final decree brings entire record up for consideration). This includes both preserved issues, Tillman v. State, 471 So. 2d 32, 34 (Fla. 1985) and issues which were not preserved but which are fundamental to the case's resolution. Trushin v. State, 425 So. 2d at 1130. In the instant case, FIGA's erroneous deduction of its own defense costs from the $300,000 available for Mrs. Rosen's covered claim was the basis for this action, Plaintiff's motion for summary judgment, and the subject of her First District Appeal. Thus, Mrs. Rosen now turns to the merits of her claim.

It is a settled rule that insurance policies are to be

construed liberally in favor of the insured and strictly against the insurer; whenever the language in the policy is susceptible to more than one construction, a court must adopt the construction most favorable to the insured. Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992), rev. den., 621 So. 2d 1065 (Fla. 1993). When FIGA becomes the insurer, liberal construction of the FIGA Act in favor of protecting both claimants and policyholders is statutorily mandated. §631.53, Fla. Stats. (1997). Thus, both the insurance policy itself, and the FIGA Act, must be interpreted in such a way as to give the strongest possible protection to these persons.

Here, the Manatee/Rumger insurance policy provided that "claims expenses are included within the limits shown in the declarations and not in addition to them," and that "We will pay all claims and claims expenses arising out of or in connection with the same or related act." (R. Vol. I, p. 37, emphasis added). However, the limits shown in the declarations were $1 million dollars, not $300,000. (R. Vol. I, pp. 11-12, ¶5). Construing the policy in the insured's favor, the costs of the insured's defense were to be deducted from the original $1 million dollar limit reflected on the declarations page of the policy. This did not and could not change on the insurer's insolvency, because a "covered claim", within the meaning of the FIGA act, is "an unpaid claim... which arises out of, and is within coverage, and not in excess of the applicable limits of an insurance policy to which this part

applies....” §631.54(3), Fla. Stats. (1997)(emphasis added). The applicable limits of “[the] insurance policy” to which this part applied, were, once again, $1,000,000., not $300,000. Thus, under the policy, as defense costs were incurred, the policy declined from $1,000,000.

In enacting a statute, the legislature is presumed to know the meaning of words it has chosen. See Florida State Racing Comm’n v. Bourquardez, 42 So. 2d 87, 88 (Fla. 1949); see also Stepanek v. Rinker Materials Corp, 697 So. 2d 200, 202, n.3 (Fla. 1st DCA 1997).

Under section 631.57(1)(a)(2), Fla. Stats. (1997), the $300,000. statutory cap only applies to FIGA’s obligation to pay “covered claims.” The statutory definition of a covered claim does not include defense costs, which are instead treated as “expenses in handling claims.” §631.54(3), (5), Fla. Stats. (1997). Thus, FIGA’s deduction of its own defense costs from the $300,000. available to its insured for coverage flies in the face of the language, as well as the purpose, of the statute.[7] This legal issue impacts every FIGA claim within this state. FIGA would have the amount it spends actually fighting claims reduce the amount statutorily available to policy-holders and claimants to pay claims.

In the court below, FIGA urged that the acceptance of Rosen’s

---

[7] FIGA is only entitled to deduct defense costs from the “limits shown in the declarations,” i.e., $1,000,000., by virtue of the policy language. (Vol. I, p. 37). The policy does not and cannot change the statutory definition of a “covered claim.”

position would give an insured who buys a cheap declining-balance policy "a windfall" when his insurer becomes insolvent, "particularly if he has a low limits policy [because] he would suddenly acquire a right to unlimited defense without reducing the indemnity amount at all." (FIGA's First District Answer Brief p. 21). This completely misstates Rosen's position, which is as follows.

In the case of an expensive, <u>non</u>-declining balance policy, the amount available for defense of a FIGA insured would remain the same as it did prior to liquidation – it would be unlimited. In the case of a "cheap" declining-balance policy, as here, the amount available for defense of a FIGA insured would also remain the same as it did prior to liquidation – it would decline from the amount stated in the declarations page. With regard to defense costs, the insureds have parity based upon the type of policy they purchased. In both instances, the insureds get precisely what they contracted for with respect to defense, both before and after liquidation. However, the costs of such defense <u>after</u> liquidation are shared between FIGA-member insurers. §631.51, Fla. Stats. (1997).

What the FIGA Act does is to cap the amount any claimant can receive on her "covered claim." §631.57(1)(a)(2), Fla. Stats. (1997). Thus, claimants do not receive "full coverage" after liquidation, but only receive coverage to a maximum $300,000. This interpretation is the only one which accommodates both the policy <u>and</u> the statute, as well as the statutory purpose of resolving

claims expeditiously. It renders it to FIGA's advantage to realistically assess the situation to curtail its defense costs -- since Association Member-insurers are surcharged with these, and bear them proportionately. It renders it to the claimant's advantage to realistically litigate because her claim is capped at $300,000, no matter how long it takes to resolve. The insured is also protected to the maximum allowable by law in all instances.

Construing both the policy and the FIGA statute *in pari materia*, and liberally to afford the most protection to the insured, there was almost $800,000 in indemnity remaining on the policy at the time FIGA stepped into Manatee's shoes. Since it was expended in defenses, it would take almost $500,000 in additional defense costs under the policy to even reach the $300,000. cap FIGA had available for indemnity.

There is no Florida case directly on point. However, a similar issue was addressed in Missouri Property and Cas. Insurance Guaranty Assn. (MIGA) v. Petrolite Corp., 918 S.W. 2d 869 (Mo. Ct. App. 1996), based on the Missouri statute in effect at the time.[8]

The trial court entered a summary judgment adverse to MIGA in the total sum of $355,555.59 comprised of three separate damage

[8] § 375.785, Mo. Rev. Stat. (1986) (since repealed and reenacted as §375.772, Mo. Rev. Stat. (1992)) limited MIGA's obligation at the time to "the amount of each covered claim which is in excess of $200. and is less than $300,000." This statutory language was similar to §631.57(1)(a)(2), Fla. Stats. (1997), in effect in Florida at the time Mrs. Rosen presented her claim.

elements: (1) the amount of the damages judgment obtained by the claimant against MIGA's insured; (2) the amount of the attorneys' fees awarded to the claimant in the underlying action; and (3) the amount of attorneys' fees incurred by MIGA's insured after MIGA withdrew its defense. On appeal, MIGA argued that the judgment was excessive, because covered claims against it were capped at $300,000, inclusive of defense fees. The appellate court rejected this argument in logic persuasive here:

> MIGA argues that the 'claim' included Petrolite's legal fees, and therefore exceeded the limit under §375.785.4(1)(a). We find this argument unpersuasive. MIGA, like Integrity [the insurer] had dual obligations under the policy. First, MIGA was required to indemnify the insured for any losses resulting from covered claims up to the policy limit or $299,800, whichever is less. Second, MIGA is required to provide a defense to the insured. There is no language in the statute that the costs to defend the insured is included in the total amount that MIGA is obligated to pay the insured under §375.785.4(1)(a). Furthermore, as a practical matter, MIGA's interpretation would lend itself to abuses clearly not intended by the legislature. Under MIGA's interpretation, it could provide a defense in a complicated case, and exhaust the $299,800 statutory limit, leaving the insured with no indemnification for the actual claim. (Id. at 873, emphasis added).

As a matter of statutory interpretation, every court considering the issue has rejected the argument made by a guaranty association that the statutory cap available for "covered claims" may be reduced by defense costs. See Missouri Property & Casualty Insurance Guaranty Assn. (MIGA) v. Petrolite Corp., 918 S.W. 2d at

873 ("MIGA argues that the claim included Petrolite's legal fees .... We find this argument unpersuasive"); Missouri Property and Casualty Ins. Guaranty Ass'n v. Pott Industries, 971 S.W. 2d 302, 305 (Mo. 1998) ("MIGA must provide the defense for Pott (insured) which Midland (insurer) would have, if it were solvent -- the duty to defend claims is not subject to the statutory cap); see also Clark Equipment Co. v. Arizona Property Cas. Ins. Guar. Fund, 189 Ariz. 433, 943 P.2d 793, 803-04 (Ariz. Ct. App. 1997)("[W]hen the Fund owes a defense, the costs are its responsibility.")(emphasis added).

FIGA's interpretation of the statute would almost always result in a boon to its lawyers, and a financial loss to policyholders and any claims against its policyholders. FIGA could retain any counsel it chose, with instructions to pay out the entire $300,000 to those lawyers, leaving no funds available to defend or to pay claims. Moreover, in a complicated case, as here, FIGA could exhaust defense costs, leaving no amount available for indemnity. This is directly contrary to FIGA's statutory mandate of avoiding "financial loss to claimants or policyholders," as well as the statute's remedial purpose.

In sum, the statute and policy at issue should more appropriately be interpreted to provide that when FIGA stepped into the shoes of Rumger/Manatee, FIGA had $300,000 available to pay the Appellant's claim – exclusive of defense fees and costs – so long as the amount of the claim and defense costs, considered together,

did not exceed the original face amount of the policy limits of liability. Here, the original policy limits were $1,000,000. FIGA spent only $261,000 in defense thus leaving the full $300,000 available to pay Mrs. Rosen's claim.

It is therefore submitted that the trial court's interpretation of both the policy and the FIGA statute were erroneous, as a matter of law. The First District Court's decision should respectfully be quashed and the case remanded with directions to enter final summary judgment in Rosen's favor.

III. FIGA IS RESPONSIBLE FOR CLAIMANTS ATTORNEYS FEES IN PURSUING HER CLAIM, AND SUCH FEES ARE NOT INCLUDED IN THE $300,000 CAP FOR "COVERED CLAIMS."

In her complaint, Rosen sought a judgment for attorneys fees against FIGA pursuant to Chapter 631, Fla. Stats. (1997) on the basis that her retention of counsel was occasioned by the denial by FIGA of coverage or indemnity beyond the $39,000. already paid by FIGA in the underlying action as part of the parties' settlement. (R. Vol. I, p. 4, ¶15-16). The trial court's entry of a summary judgment in FIGA's favor made this attorney fees issue moot. Since the District Court of Appeal affirmed the summary judgment, it likewise denied Mrs. Rosen's motion for appellate attorneys fees, which was predicated upon §§631.70 and 627.428, Fla. Stats. (1997). This too presents strictly a legal issue now ripe for adjudication by this State's highest court, and presents an important issue involving the construction and interplay of the FIGA Act, with

§627.428, Fla. Stats.

Section 627.428, Fla. Stats. (1997), contained in the insurance code, authorizes a fee award "Upon rendition of a judgment or decree by any court of this state and in favor of the named beneficiary, under a policy or contract executed by the insurer...." Section 631.70, Fla. Stats. (1997), in contrast states that the provisions of §627.428 are not applicable "to any claim presented to the association under the provisions of this part, except when the association denies by affirmative action, other than delay, a covered claim or a portion thereof." (Emphasis added).

Reading these statutes *in pari materia* as well as in conjunction with the purpose of the FIGA Act, §631.51, (protecting FIGA claimants from loss), and remedial scope, §631.53 (requiring liberal construction), these statutes authorize an award of attorneys fees to claimants, and are not limited to insureds or beneficiaries – where FIGA denies a "covered claim" by affirmative action.

In Florida Ins. Guar. Ass'n v. Giordano, 485 So. 2d at 457, the Third District reversed the denial of attorneys fees to the claimant, and ruled that Mrs. Giordano was entitled to recover attorneys fees for the enforcement action she was required to file after FIGA denied payment of her covered claim. Id. at 457. FIGA will say that this is because Mrs. Giordano was an assignee of its insured. However, if a claimant has a direct right of action

against FIGA, then this is a distinction without a difference. Moreover, the Giordano court did not mention this as a basis for its fee award, while it **did** mention this as a basis for the requirement that FIGA pay Giordano's cost judgment in the underlying action.

In contrast, Florida Ins. Guar. Ass'n v. Jacques, 643 So. 2d 101 (Fla. 4th DCA 1994), the Fourth District reversed a fee award to a FIGA claimant. Its entire reasoning on the issue is found in one paragraph:

> We do not find merit in FIGA's contention that the trial court erred in awarding Jacques' attorney's fees. The trial court based its award upon sections 631.70 and 627.428, Fla. Statutes. Even though FIGA denied coverage by affirmative action, appellee concedes "there was no underlying entitlement to fees pursuant to section 627.428, Florida Statutes, under the circumstances of this case." We agree. Therefore, the award of attorney's fees to Jacques must be reversed. Id. at 102. (Emphasis added).

Since the Fourth District's decision was based on a concession, it clearly did not consider whether the FIGA Act itself broadened the class of persons entitled to fees, to include a FIGA "claimant." See also Zinke-Smith, Inc. v. Florida Ins. Guarnty Ass'n, 304 So. 2d 507 (Fla. 4th DCA 1974), cert. denied, 315 So. 2d 469 (Fla. 1975) (agreeing generally that effect of statute was to make FIGA an insurer on a "covered claim," and to render §627.428 applicable to FIGA cases, but not addressing the issue presented here).

Florida courts have consistently held that the purpose of

section 627.428 is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorneys fees when they are compelled to sue to enforce their insurance contracts. Insurance Co. of North America v. Lexow, 602 So. 2d 528, 531 (Fla. 1992). When FIGA denies a valid "covered claim," however, it is the claimant who is out of pocket. The purpose of the FIGA statute of protecting claimants from financial loss or compensation due to an insured's insolvency would be defeated by making the claimant bear the fees incurred in prosecuting her claims. Construing §627.428 with 631.70, *in pari materia*, it is respectfully submitted that fees are recoverable by a FIGA claimant where FIGA denies a valid covered claim.

It is respectfully submitted that Florida Ins. Guar. Ass'n v. Giordano supra, once again applies and that Rosen is entitled to recover her attorneys fees against FIGA in prosecuting this action in addition to the full amount of her covered claim.

CONCLUSION

The District Court decision should be quashed with directions on remand to enter summary judgment in Rosen's favor on all issues. If this Court perceives any disputed material factual issues, in the alternative, the case should be remanded for trial. In any event, it is respectfully submitted that Rosen should be entitled to an award of attorneys fees against FIGA in addition to the full amount of her covered claim.

Respectfully submitted,

TILGHMAN & VIETH, P.A.
One Biscayne Tower, Suite 2401
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 381-8806

and

Lauri Waldman Ross, Esq.
Lauri Waldman Ross, P.A.
Two Datran Center, Suite 1705
9130 S. Dadeland Boulevard
Miami, Florida 33156
(305) 670-8010

By: ______________________________
Lauri Waldman Ross, Esq.
(Fla. Bar No.: 311200)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this ___ day of October, 2000.

Helen Ann Hauser, Esq.
Dittmar & Hauser, P.A.
3250 Mary Street
Coconut Grove, FL 33133
(305) 442-4333

By: ______________________________
Lauri Waldman Ross, Esq.